

No. 11776

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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LAURA GAWECKI and COLLETTE MITRE, doing  
business under the fictitious name of SKYLARK  
CAFE & RESTAURANT,

Appellants,

vs.

DUBUQUE FIRE & MARINE INSURANCE COM-  
PANY OF DUBUQUE, IOWA, a corporation,

Appellee.

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## TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

GEORGE PENNEY

ROBERT M. NEWELL

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For Appellee:

ANGUS C. McBAIN

639 South Spring Street  
Los Angeles 14, Calif. [1\*]

\*Page number appearing at foot of Certified Transcript.

In the District Court of the United States in and for the  
Southern District of California

Central Division

No. 5869-Y

LAURA GAWECKI and COLLETTE MITRE, doing  
business under the fictitious name of SKYLARK  
CAFE & RESTAURANT,

Plaintiffs,

vs.

DUBUQUE FIRE & MARINE INSURANCE COM-  
PANY OF DUBUQUE, IOWA, a corporation,

Defendant.

COMPLAINT FOR DAMAGES UNDER FIRE  
INSURANCE CONTRACT

Plaintiffs Complain and Allege:

I.

That at all times herein mentioned plaintiffs were partners doing business under the fictitious name of Skylark Cafe & Restaurant. That the plaintiffs were and are citizens of the State of California.

II.

That at all times herein mentioned defendant was and now is a corporation organized under and by virtue of the laws of the State of Iowa, and was and now is a citizen of the State of Iowa.

III.

That the defendant was at all times herein mentioned engaged in the business of writing insurance under and



by virtue of the [2] laws of the State of California pertaining to insurance companies.

IV.

That the amount in controversy herein, exclusive of interest and costs, is the sum of \$10,166.10 and is in excess of \$3000.

V.

That the jurisdiction of this court is based upon the diversity of citizenship of the parties hereto and the amount in controversy, exclusive of interests and costs, being in excess of \$3000.

VI.

That on or about the 9th day of July 1945, for a valuable consideration, defendant issued a fire insurance policy on the California standard form in which it insured the store, office, workshop, business, furniture, fixtures and equipment, tenants' improvements and betterments, and other personal property of the plaintiffs located at 7519 Sunset Boulevard, Los Angeles, California, in the amount of \$12,500.

VII.

That on or about the 12th day of January 1946, and while said insurance policy hereinabove mentioned was in full force and effect, a fire occurred on the premises occupied by the plaintiffs resulting in loss and damage to the property of the plaintiffs in the amount of \$26,880.23.

VIII.

That immediately thereafter plaintiffs gave written notice of said loss to defendant, and protected the property

from further damage, separated the damaged and undamaged personal property, and put it in the best possible order, and made a complete inventory, stating the quantity and cost of each article and the amount claimed thereon. That within 60 days after the commencement of the fire, the insured notified the defendant company, at its main office in California, by written statement, signed and sworn to, setting forth [3] their knowledge and belief as to the origin of the fire, the interest of the insured and all others in the property, the cash value of the different articles or properties and the amount of loss thereon, all encumbrances thereon, all other insurance covering said articles, a copy of the description and schedules of all other policies, and all changes of title, use, occupancy, location, and possession of said property.

#### IX.

That following the receipt by defendant of the said sworn proof of loss hereinabove mentioned, defendant disagreed with the amount claimed therein and demanded of plaintiffs that they submit the question of the amount of loss and damage to an appraisal, and defendant named a competent and disinterested appraiser; whereupon and pursuant to said request for appraisal these plaintiffs named a competent and disinterested appraiser, and the two appraisers so selected nominated an umpire; and thereafter the two appraisers and the umpire did, on or about the 21st day of May 1946, agree in writing that the loss and damage to the property of the plaintiffs was the sum of \$26,880.23.

#### X.

That there was in existence at the time of the issuing of said policy of defendant a policy of insurance issued

by the General Insurance Company of America in the amount of \$35,500, making a total insurance on the property of the plaintiffs in the amount of \$48,000. That the insurance policy of the General Insurance Company of America insured separately the food and liquor of plaintiffs, the loss to which under the appraisal agreement above mentioned was determined to be the sum of \$1953.70. That the policy of insurance issued by defendant insured separately the tenants' improvements, the loss to which under the appraisal agreement above mentioned was determined to be the sum of \$4968.76. That the pro rata share of the balance of \$19,957.77 under the terms and conditions of the [4] policy issued by the defendant was  $12.5/48 \times \$19,957.77$ , or \$5197.34, making the total liability of defendant under its policy of insurance the sum of \$10,166.10.

## XI.

That at the time of the issuing of said policy the plaintiffs were not the sole and unconditional owners of the personal property located at 7519 Sunset Boulevard, but there was at the time of the issuing of said policy in full force and effect a chattel mortgage on said property issued by plaintiffs to Walter J. McCormick and Edward A. Matlin, which fact was known to the agents of the defendant at the time of the issuing of said policy. That said property insured by defendant at 7519 Sunset Boulevard was further subject to a lien in favor of Leo Kanner and Bertha Kanner, owners of the building at 7519 Sunset Boulevard, for the payment of rents due said owners from plaintiffs, a fact which was known to the agents of defendant at the time of the writing of said contract of insurance.

## XII.

That said mortgage issued to the said Walter J. McCormick and Edward A. Matlin, and said lien in favor of Leo Kanner and Bertha Kanner have heretofore been satisfied, and the plaintiffs are now entitled to all amounts due under said policy.

## XIII.

That there is now due and owing from the defendant to the plaintiffs the sum of \$10,166.10, and although demand has been made upon the defendant for said sum, no part thereof has been paid.

## XIV.

That plaintiffs are informed and believe and upon such information and belief allege that the defendant has refused payment of the amount due and owing to the plaintiffs under the policy of insurance because of a provision in said policy, viz.:

“This entire policy shall be void if the interest of the insured be other than unconditional and sole ownership.” [5]

## XV.

That the defendant, with full knowledge of the fact that the interest of the plaintiffs was not that of sole and unconditional ownership, after the fire required plaintiffs to submit to an examination under oath, required plaintiffs to submit their loss to an appraisal, and has not at any time cancelled said policy or the remainder thereof and has retained the entire premium for said policy and has waived that portion of the terms and conditions of said policy which require the interest of the insured to be unconditional and sole ownership.

Wherefore, plaintiffs pray judgment against defendant in the sum of \$10,166.10, together with interest thereon at the rate of 7 per cent per annum from the 21st day of May 1946; for costs herein expended; and for such other and further relief as to the court may seem proper.

GEORGE PENNEY

Attorney for Plaintiffs [6]

[Verified.]

[Endorsed]: Filed Oct. 17, 1946. Edmund L. Smith, Clerk. [7]

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[Title of District Court and Cause]

## ANSWER

Comes now the defendant, Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, and for answer to the complaint herein:

### I.

As to Paragraph I, alleges it has no information or belief on the subject sufficient to enable it to answer, and upon that ground denies the same and each and every allegation, matter, and thing therein contained.

### II.

As to Paragraph IV, alleges it has no information or belief on the subject sufficient to enable it to answer, and upon that ground denies that the amount in controversy herein, with or without interest or costs, is in the sum of \$10,166.10, or in any sum, or in excess of \$3,000.00, or in any sum. [8]

## III.

As to Paragraph V, alleges it has no information or belief on the subject sufficient to enable it to answer, and upon that ground denies that the amount in controversy, with or without interest and costs, is in excess of \$3,000.00, or in any sum.

## IV.

As to Paragraph VI, admits that on or about the ninth day of July, 1945, for a premium paid, this defendant issued a fire insurance policy to plaintiffs on the California standard form in which it insured certain store, office, workshop, business, furniture, fixtures and equipment, and tenants' improvements, and certain other personal property at the location described in said Paragraph VI in an amount not to exceed \$12,500.00, which said insurance policy was subject to various terms, conditions, and limitations, contained therein and indorsed thereon, but denies each and every allegation, matter, and thing contained in said Paragraph VI, inconsistent with or contrary to that which is in this paragraph specifically admitted.

## V.

As to Paragraph VII, denies that said insurance policy was in full force or effect, or that it was in force or effect at the time of the occurrence of said alleged fire, and as to the balance of said Paragraph VII, alleges it has no information or belief on the subject sufficient to enable it to answer and upon that ground denies the same and each and every allegation, matter and thing therein contained, and denies the loss and damage in the amount of \$26,880.23, or in any sum.

VI.

As to Paragraph VIII, admits that plaintiffs gave written notice of an alleged loss to defendant immediately after January 12, 1946; admits that within 60 days after January 12, 1946, the plaintiffs notified the defendant at its main office in [9] California by written statement, signed and sworn to, purporting to set forth their alleged knowledge and belief as specified in said Paragraph VIII. As to the balance of said Paragraph VIII, defendant alleges it has no information or belief on the subject sufficient to enable it to answer, and upon that ground denies the same and each and every allegation, matter and thing therein contained.

VII.

As to Paragraph IX, defendant alleges that it has no information or belief on the subject sufficient to enable it to answer, and upon that ground denies that the loss and damage agreed upon by said appraisers and umpire was upon the property described in this defendant's policy of insurance, or on any of said property, or that the loss or damage to the property described in said policy was in the sum of \$26,880.23, or in any sum.

VIII.

As to Paragraph X, admits that at the time of the issuance of defendant's policy there was in existence a policy of insurance issued by said General Insurance Company of America in the amount of \$35,500.00; admits said insurance policy of said General Insurance Company of America insured separately food and liquor; admits that by the terms of defendant's policy insurance was provided for tenants' improvements. As to the balance of said Paragraph X, not herein above specifically ad-



mitted, defendant alleges that it has no information or belief on the subject sufficient to enable it to answer, and upon that ground denies the same and each and every allegation, matter and thing therein contained, and denies the loss to food and liquor was determined to be the sum of \$1,953.70, or any sum, or that the loss to tenants' improvements was determined to be the sum of \$4,968.76, or any sum, or that the balance was \$19,957.77, or any sum, or that the pro rata share of the defendant in said or any balance [10] was in the sum of \$5,197.34, or in any sum. Denies that the total liability of this defendant was or is in the sum of \$10,166.10, or in any sum.

#### IX.

As to Paragraph XI, defendant denies that the existence of said chattel mortgage issued by plaintiffs to Walter J. McCormick and Edward A. Matlin, or the existence of said lien in favor of Leo Kanner and Bertha Kanner, was known to it or to any agents of this defendant at the time of the issuing or the writing of this defendant's policy, or at any time until said facts were first discovered after the occurrence of the alleged fire and loss and damage described in the complaint.

#### X.

As to Paragraph XII, defendant alleges it has no information or belief on the subject sufficient to enable it to answer, and upon that ground denies the same and each and every allegation, matter, and thing therein contained.

#### XI.

As to Paragraph XIII, defendant admits that demand has been made upon it for said sum, and admits that no part of said sum has been paid, but denies that there is now, or that there ever was, due or owing from this



defendant to plaintiffs the sum of \$10,166.10, or any sum.

## XII.

As to Paragraph XIV, admits this defendant has refused payment of the amount claimed by plaintiffs under defendant's policy of insurance, amongst other reasons because of the policy provision quoted, but denies that said provision was or is the sole ground for defendant's refusal to pay said claim, and denies each and every allegation, matter, and thing in said Paragraph XIV inconsistent or contrary to the specific admissions or denials above made. [11]

## XIII.

As to Paragraph XV, defendant admits it required plaintiff Laura Gawecki to submit to an examination under oath after the alleged fire, and admits that it requested that the loss be submitted to appraisal in accordance with the terms and provisions of its policy, and admits it has not at any time cancelled said policy or any portion thereof, and admits it has retained the entire premium for said policy, but denies the balance of said Paragraph XV and each and every allegation, matter, and thing therein contained.

As a First, Separate and Affirmative Defense to the Complaint Herein, the Defendant Alleges:

### I.

That by the terms, provisions, and conditions of the defendant's policy of insurance sued on herein, it was provided, amongst other things:

“ . . . this entire policy would be void . . .  
(b) if the interest of the insured be other than unconditional and sole ownership . . . ”

## II.

That at the time of the occurrence of the alleged fire and loss and damage described in the complaint, the interest of the plaintiffs in the subject matter of the defendant's insurance policy was other than unconditional and sole ownership in that prior to the occurrence of the fire alleged in the complaint the plaintiffs herein did execute and deliver to and in favor of Walter J. McCormick and Edward A. Matlin a written chattel mortgage upon the property which was the subject of defendant's policy, and did execute and deliver to and in favor of Leo Kanner and Bertha Kanner an agreement in writing imposing a lien or a written chattel mortgage upon said property, and that said chattel mortgage in favor of said Walter J. McCormick and Edward A. Matlin, [12] and said lien or chattel mortgage in favor of said Leo Kanner and Bertha Kanner were, at all times after their execution and delivery, and at the time of and until some time after the occurrence of the alleged fire and loss and damage described in plaintiffs complaint, in full force and effect, and the holders of said chattel mortgages and lien at all of said times had an interest in said property.

As a Second, Separate and Affirmative Defense to Plaintiffs' Complaint, Defendant Alleges:

## I.

That by the terms and provisions of the defendant's policy of insurance sued upon herein, it was provided amongst other things:

"Unless otherwise provided by agreement in writing indorsed hereon or added hereto, this company shall not be liable for loss or damage to any property insured here-under while incumbered by a chattel mortgage . . ."

II.

That at the time of the occurrence of the alleged fire and loss and damage described in the complaint, the property described and insured by defendant's policy of insurance was incumbered by chattel mortgages in that prior to the occurrence of the fire alleged in the complaint the plaintiffs herein did execute and deliver to, and in favor of, Walter J. McCormick and Edward A. Matlin a written chattel mortgage upon said property, and did execute and delivery to and in favor of Leo Kanner and Bertha Kanner a written chattel mortgage and lien upon said property, which said chattel mortgages and lien were, at all times after their execution and delivery aforesaid, and at the time of and until some time after the occurrence of the fire and loss and damage described in plaintiffs' complaint, in full force and effect. [13]

III.

That there was never any provision by agreement in writing indorsed on the policy or added thereto, or otherwise, for said or any chattel mortgages, and this defendant had no knowledge or notice thereof until long after the occurrence of said alleged fire and loss and damage, if any.

Wherefore, defendant prays that plaintiffs take nothing by their action and that defendant go hence with its costs and with such other relief as appears meet and proper.

ANGUS C. McBAIN

Attorney for Said Defendant [14]

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 22, 1946. Edmund L. Smith, Clerk. [15]

[LETTER DATED AUGUST 4, 1947, TO  
TRIAL JUDGE]

Law Office

Angus C. McBain

McBAIN & MORGAN

Kermit J. Morgan

639 South Spring Street

—

Los Angeles 14, California

Leander W. Pitman

VAndike 1303

August 4, 1947

Hon. Leon R. Yankwich

Judge of the United States District Court

Federal Building

Los Angeles 12, California

Re: Gawecky vs. Dubuque—5869-Y Civil

Dear Judge Yankwich:

At the conclusion of the hearing on Mr. Penney's motion before you on the 2:00 o'clock calendar Wednesday, July 30, 1947, it was agreed between Mr. Penney and the writer, with the approval of the Court, that we should submit to you in letter form a statement of the nature of the authority of Myer Pransky in behalf of the defendant Dubuque Fire & Marine Insurance Company.

We have ascertained the nature of this authority and at the suggestion of Mr. Penney this letter is being directed to the Court at this time.

The defendant Dubuque Fire & Marine Insurance Company stipulates as follows:

"That Myer Pransky was designated an agent of the Dubuque Fire & Marine Insurance Company by filing a written designation as such with the Department of Insurance of the State of California; that such written designation does not set forth the nature of the agency or authority thereby conferred upon

Mr. Pransky; that there was no written agency contract between Mr. Pransky and Dubuque Fire & Marine Insurance Company; that Mr. Pransky was given verbal authority to solicit insurance in behalf of the Company and to place orders for insurance so solicited with the Dubuque Fire & Marine Insurance Company or its general agents for acceptance or rejection; that Myer Pransky had no [16] authority to 'bind' risks and no authority to countersign policies of insurance; that he did have authority to deliver policies to the assureds once the policies were written and that policies so written by the Dubuque Fire & Marine Insurance Company or its general agents were delivered by the latter to Mr. Pransky for delivery to the assureds."

Mr. Penney has accepted this stipulation and has requested that the writer transmit it to the Court in the present form.

If Mr. Penney is available to join in signing this letter we shall obtain his signature thereto although he has requested that we send it to the Court direct. If he is not available to sign it the writer requests by transmission to him of a duplicate of this letter that he telephone his approval to the Court's Secretary.

Respectfully submitted

ANGUS C. McBAIN

Attorney for Defendant Dubuque Fire & Marine  
Insurance Company

Stipulation Accepted

GEORGE PENNEY

Attorney for Plaintiffs

[Endorsed]: Filed Aug. 5, 1947. Edmund L. Smith,  
Clerk. [17]

## MEMORANDUM DECISION

[Being the same as in Case No. 11775, which will be found at pages 12 to 16 of Transcript of Record.]

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[Title of District Court and Cause]

OBJECTIONS TO PROPOSED FINDINGS OF  
FACT AND CONCLUSIONS OF LAW

Come now the plaintiffs, by their attorney George Penney, and object to the Proposed Findings of Fact and Conclusions of Law heretofore submitted by the defendant's attorney, in the following particulars:

## I.

Plaintiffs object to the findings set forth in paragraph VIII of said proposed findings of fact, commencing at line 28 and ending at line 31 on page 3, as said policy of insurance specifically insured the property described in the complaint. Plaintiffs further object to the remainder of the findings set forth in said paragraph VIII for the reason that in the stipulation entered into between the respective counsel the prorata share of each policy was to be determined in the event that the court found in favor of the plaintiffs. [24]

## II.

Plaintiffs object to the findings set forth in paragraph IX of said proposed findings of fact relative to the alleged chattel mortgage executed and issued to Walter J. McCormick and Isabel McCormick mortgaging an undivided

one-third of the plaintiffs' property as security for the payment of rents to said mortgagees as owner of the building at 7519 Sunset Boulevard; and in this connection the plaintiffs request that the court specifically find that the plaintiffs were not delinquent at any time in the payment of rents and that said alleged chattel mortgage was not within the contemplation of the policy of insurance written by defendant.

Plaintiffs object to the remainder of said findings, commencing at line 2 and ending at line 10 on page 5, and request the court to specifically find that Myer Pransky, a soliciting agent of the defendant insurance company, had knowledge and notice of the existence of said chattel mortgages prior to the time and at the time of the writing of the policy of insurance.

### III.

Plaintiffs object to the findings set forth in paragraph XIII of said proposed findings of fact and request the court to find that Myer Pransky, a soliciting agent of the defendant company, had full knowledge of the fact that the interest of the plaintiffs in the property was not sole and unconditional; and to further find that the defendant had knowledge of the existence of other interests at the time of the filing of the proof of loss; and that the court further find that the adjusting representatives of the defendant company, Dauerty & Dauerty, were apprised of the existence of the chattel mortgage to Edward A. Matlin at the time of the filing of the proof of loss and prior to the time of demand for appraisal; and further, that the



agents of the defendant company had constructive knowledge of the existence of the chattel mortgages executed by the plaintiffs, as said chattel mortgages were recorded on the [25] 22nd day of August 1945 in the office of the County Recorder of Los Angeles County.

#### IV.

Plaintiffs object to the findings set forth in paragraph XVI of said proposed findings of fact upon the ground that the alleged mortgage issued in favor of Walter J. McCormick and Isabel McCormick was not a mortgage within the contemplation of the policy, as the plaintiffs were never delinquent in the payment of rents. Plaintiffs specifically object to the remainder of said paragraph and request the court to find that the plaintiffs had an insurable interest in the property.

#### V.

Plaintiffs object to the findings set forth in paragraphs XVIII of said proposed findings of fact for the reason that the alleged mortgage to Walter J. McCormick and Isabel McCormick was not a mortgage within the contemplation of the policy; and further request the court to find that the existence of said chattel mortgages was known to Myer Pransky, soliciting agent of the defendant company, both prior to and at the time of the issuing of said policy.

#### VI.

Plaintiffs object to the findings set forth in paragraph XIX of said proposed findings of fact upon the ground



that Myer Pransky, soliciting agent of the defendant company, had knowledge of the existence of the chattel mortgages both before and at the time of the issuing of said policy of insurance.

Respectfully submitted,

GEORGE PENNEY

Attorney for Plaintiffs [26]

[Affidavit of Service by Mail.]

[Written]: Objections considered and overruled.

LRY, J.

[Endorsed]: Lodged Aug. 19, 1947. Filed Aug. 19, 1947. Edmund L. Smith, Clerk. [27]

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[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

The above entitled cause having come on for trial in the above entitled Court on the 17th day of June, 1947, the Honorable Leon R. Yankwich, Judge Presiding, the plaintiffs Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, having appeared in person and by their attorney George Penney, Esq., and the defendant Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, a corporation, having appeared by its attorney Angus C. McBain, and the court having heard the evidence and the argument of counsel, and the matter having been there-

after submitted to the Court for decision, now therefore, the Court does hereby make its findings of fact as follows: [28]

## FINDINGS OF FACT

### I.

That all of the allegations, matters, and things contained in Paragraphs I, II, and III of plaintiffs' complaint are true.

### II.

That all of the allegations contained in Paragraph IV of plaintiffs' complaint are true except that the Court does not determine the exact amount in controversy because it was agreed by the parties to the action that said amount would be determined by stipulation in the event the Court had found the remaining issues in favor of the plaintiffs.

### III.

That all of the allegations, matters, and things contained in Paragraph V of the complaint are true.

### IV.

That all of the allegations, matters, and things contained in Paragraph VI of plaintiffs' complaint are true and it is further true that said insurance policy was subject to various terms, conditions, and limitations contained therein and endorsed thereon.

### V.

As to Paragraph VII of plaintiffs' complaint, it is true that on or about the 12th day of January 1946 a fire occurred on the premises occupied by the plaintiffs resulting in loss and damage to the property of the plaintiffs in the amount of \$26,880.23, but it is not true that

the insurance policy referred to in said complaint was in full force or effect or in force or effect at all at the time said fire and loss and damage occurred.

## VI.

As to Paragraph VIII of plaintiffs' complaint, the Court finds that all of the allegations, matters, and things [29] therein contained are true except that the cash value of the different articles or properties and the amount of loss thereon were not as set forth in said written and sworn statement furnished by plaintiffs to defendant, nor were all of the incumbrances upon the said property specified in said statement. Because no evidence was presented as to the cash value of the different articles or properties or as to the amount of loss thereon, except for the appraisers' award in writing, the Court finds all allegations as to such cash value and as to the amount of loss, except as the loss is herein specifically determined, to be untrue.

## VII.

That all of the allegations, matters, and things contained in Paragraph IX of plaintiffs' complaint are true.

## VIII.

As to Paragraph X of plaintiffs' complaint, it is true that at the time of the issuing of the defendant's policy there was in existence a policy of insurance issued by the General Insurance Company of America in the amount of \$35,500.00 making a total insurance on the property of the plaintiffs in the amount of \$48,000.00 as long as both policies were in full force and effect. It is true that the policy of said General Insurance Company of America was worded to insure separately the food and liquor of

plaintiffs and that the loss to said food and liquor was, under the appraisal agreement, determined to be the sum of \$1,953.70. It is true that the policy of insurance of the defendant herein was worded to insure separately the tenants' improvements and that the loss of such tenants' improvements was, under the appraisal agreement, determined to be the sum of \$4,968.76. It is not true that either of said policies insured any of said properties at the time of the occurrence of the fire and loss and damage described in the complaint. The Court finds that it is not true that the pro rata share of this defendant of the balance of \$19,957.77 or of any [30] balance or sum, under the terms and conditions of the defendant's policy or otherwise, was 12.5/48ths of said sum of \$19,957.77, or of any sum, or that the defendant's pro rata share of said or any balance was \$5,197.34, or any sum, and it is not true that the total or any liability of defendant under its said policy of insurance was in the sum of \$10,166.10, or in any sum, and in this respect the Court finds that there was no liability on the part of the defendant under its said policy for any sum whatsoever to plaintiffs or either of them; the Court further finds that all allegations, matters, and things contained in said Paragraph X of plaintiffs' complaint inconsistent with or contrary to the findings made in this Paragraph VIII are untrue.

## IX.

As to Paragraph XI of plaintiffs' complaint, the Court finds that at the time of the issuing of defendant's policy and at all times thereafter and at the time of the occurrence of the fire and loss and damage described in the complaint, the plaintiffs were not the sole and unconditional owners of the personal property located at 7519 Sun-

set Boulevard and that it is true that there was in full force and effect commencing on July 7, 1945, and at all times thereafter and at the time of the occurrence of and until after the occurrence of the fire and loss and damage described in plaintiffs' complaint, a chattel mortgage on all of plaintiffs said property issued, executed, and delivered by plaintiffs, as mortgagors, to Edward E. Matlin, as mortgagee. It is also true that commencing on July 7, 1945, and at all times thereafter and at the time of the occurrence of and until after the occurrence of the fire and loss and damage described in plaintiffs' complaint, there was in full force and effect a second chattel mortgage issued, executed and delivered by plaintiffs, as mortgagors, to Walter J. McCormick and Isabelle McCormick, as mortgagees, mortgaging an undivided one-third of all of plaintiffs said property, as security [31] for the payment of rents from plaintiffs to said mortgagees, the owners of the building at 7519 Sunset Boulevard. It is not true that these facts were known to the or any agents of this defendant, or that any agents of said defendant had any notice or knowledge of the existence of said chattel mortgages at the time of the writing of said defendant's policy of insurance, or at any time whatsoever. The Court finds all allegations, matters, and things contained in Paragraph XI of plaintiff's complaint which are inconsistent with or contrary to the findings made in this Paragraph IX to be untrue.

## X.

As to Paragraph XII of plaintiffs' complaint, it is true that the chattel mortgages described in Paragraph IX of these findings were satisfied after the occurrence of the fire and loss and damage described in the complaint and prior to the commencement of this action, but it is not

true that the plaintiffs, or either of them, are now entitled to all amounts or any amounts under the defendant's policy and it is not true that there is any amount due to plaintiffs under said policy. The Court further finds that all allegations, matters, and things contained in said Paragraph XII of plaintiffs' complaint which are inconsistent with the findings herein specifically made are untrue.

### XI.

As to Paragraph XIII of plaintiffs' complaint, it is not true that there is now due or owing, or ever was due or owing, from the defendant to the plaintiffs the sum of \$10,166.10, or any sum at all. It is true that plaintiffs heretofore made demand upon the defendant for said sum of \$10,166. 10 and that no part thereof has been paid.

### XII.

As to Paragraph XIV of plaintiffs' complaint, it is true that defendant's policy of insurance contains, amongst other [32] things, the provision quoted in said Paragraph XIV, and it is true that the defendant refused payment of any sum to plaintiffs under defendant's policy of insurance because of said policy provision and because of other policy terms, provisions and conditions not referred to in said Paragraph XIV.

### XIII.

As to Paragraph XV of plaintiffs' complaint, it is true that after the fire described in plaintiffs' complaint the defendant required plaintiffs to submit to an examination under oath and required plaintiffs to submit their loss to

an appraisal, and it is true that the defendant has not at any time cancelled its said policy or any part thereof and that it has retained the entire premium for said policy, but it is not true that the defendant had full or any knowledge of the fact that the interest of the plaintiffs was not that of sole and unconditional ownership at the time defendant required said examination under oath and appraisal, and as there is no evidence to show when the defendant might have acquired knowledge of said fact, the Court finds that said defendant had no knowledge whatsoever of the existence of other persons' interests in plaintiffs' property until served with summons and complaint in this action. The Court further finds that the defendant has not waived any of the terms and conditions of its policy and has not waived that portion of the terms and conditions of its policy which requires the interest of the insured to be unconditional and sole ownership.

#### XIV.

The Court finds that all allegations, matters, and things contained in plaintiffs' complaint which are contradictory of or inconsistent with the findings of fact herein made are untrue.

#### XV.

As to the First, Separate and Affirmative Defense to the complaint set forth in the defendant's answer on file herein, the [33] Court finds that all of the allegations, matters and things contained in Paragraph I thereof are true.



## XVI.

As to Paragraph II of said First, Separate and Affirmative Defense, the Court finds it is true that at the time of the occurrence of the fire and loss and damage described in plaintiffs' complaint, the interest of the plaintiffs in the subject matter of the defendant's insurance policy was other than unconditional and sole ownership in that prior to the occurrence of the fire described in the complaint the plaintiffs as mortgagors did execute and deliver to and in favor of Edward E. Matlin, as mortgagee, a written chattel mortgage upon the property which was the subject of defendant's policy, and did also execute and deliver to and in favor of Walter J. McCormick and Isabelle McCormick, as mortgagees, a written chattel mortgage upon an undivided one-third of said property and that both of said chattel mortgages were at all times after their execution and delivery and at the time of and until after the occurrence of the fire and loss and damage described in plaintiffs' complaint, in full force and effect, and the holders or mortgagees of said chattel mortgages at all of said times had an interest in said property.

## XVII.

As to Paragraph I of the Second, Separate and Affirmative Defense to plaintiffs' complaint set forth in defendant's answer herein, the Court finds that it is true that by the terms and provisions of the defendant's policy of insurance sued upon herein, it was provided amongst other things:

"Unless otherwise provided by agreement in writing indorsed hereon or added hereto, this company



shall not be liable for loss or damage to any property insured hereunder while incumbered by a chattel mortgage . . .” [34]

### XVIII.

As to Paragraph II of said Second, Separate and Affirmative Defense, the Court finds all of the allegations, matters, and things therein contained are true, and it is true that at the time of the occurrence of the fire and loss and damage described in plaintiffs’ complaint the property described and insured by defendant’s policy of insurance was incumbered by chattel mortgages and that prior to the occurrence of said fire the plaintiffs, as mortgagors, did execute and deliver to Edward E. Matlin, as mortgagee, a written chattel mortgage upon all of said property and did execute and deliver, as mortgagors, to Walter J. McCormick and Isabelle McCormick, as mortgagees, a written chattel mortgage upon an undivided one-third of said property, and that said chattel mortgages were at all times after their execution and delivery aforesaid, and at the time of and until some time after the occurrence of said fire and loss and damage, in full force and effect.

### XIX.

It is true that there was never any provision by agreement in writing endorsed on the defendant’s policy or added thereto, or otherwise, for said or any chattel mortgages, and that the defendant had no knowledge or notice of said chattel mortgages until after the occurrence of said alleged fire and loss and damage.

From its findings of fact aforesaid and the law the Court hereby makes the following:

## CONCLUSIONS OF LAW

### I.

That the defendant Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, a corporation, is entitled to judgment that the plaintiffs Laura Gawrecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, take [35] nothing against said defendant and that the said defendant have and recover from said plaintiffs its costs and disbursements herein.

Done in open court this 19th day of August, 1947.

LEON R. YANKWICH

Judge

Approved as to Form under Rule No. 7.

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Attorneys for Plaintiffs

Disapproved as to Form.

GEORGE PENNEY

Attorney for Plaintiffs

[Endorsed]: Lodged Aug. 19, 1947. Filed Aug. 19, 1947. Edmund L. Smith, Clerk. [36]

In the District Court of the United States in and for the  
Southern District of California

Central Division

No. 5869-Y

LAURA GAWECKI and COLLETTE MITRE, doing  
business under the fictitious name of SKYLARK  
CAFE & RESTAURANT,

Plaintiffs,

vs.

DUBUQUE FIRE & MARINE INSURANCE COM-  
PANY OF DUBUQUE, IOWA, a corporation,

Defendant.

### JUDGMENT

The above entitled cause having come on for trial in the above entitled Court on the 17th day of June, 1947, the Honorable Leon R. Yankwich, Judge Presiding, the plaintiffs Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, having appeared in person and by their attorney George Penney, Esq., and the defendant Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, a corporation, having appeared by its attorney Angus C. McBain and the court having heard the evidence and the argument of counsel, and the matter having been thereafter submitted to the Court for decision, and the Court having made its findings of fact and conclusions of law

herein, now therefore, in accordance with the facts and the law:

It Is Hereby Ordered, Adjudged and Decreed that the [37] defendant Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, a corporation, have judgment that the plaintiffs Laura Gawrecki and Collette Mitre, doing business unde the fictitious name of Skylark Cafe & Restaurant, take nothing against said defendant and that the said defendant have and recover from said plaintiffs its costs and disbursements herein.

Done in open court this 19th day of August, 1947.

LEON R. YANKWICH

Judge

Approved as to Form under Rule No. 7.

GEORGE PENNEY

Attorney for Plaintiffs

Judgment entered Aug. 19, 1947. Docketed Aug. 19, 1947. C. O. Book 44, page 711. Edmund L. Smith, Clerk; by John A. Childress, Deputy.

[Endorsed]: Lodged Aug. 19, 1947. Filed Aug. 19, 1947. Edmund L. Smith, Clerk. [38]

[Title of District Court and Cause]

## NOTICE OF ENTRY OF JUDGMENT

To the Plaintiffs Above Named and to George Penney,  
Esq., Their Attorney:

Please take notice that on August 19, 1947, the above entitled Court did file and enter judgment in the above entitled cause in Civil Order Book 44 at page 711, that the defendant Dubuque Fire and Marine Insurance Company of Dubuque, Iowa, a corporation, have judgment that the plaintiffs Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, take nothing against said defendant and that said defendant have and recover from said plaintiffs its costs and disbursements herein.

Dated at Los Angeles, California, this 21st day of August, 1947.

ANGUS C. McBAIN

Attorney for Said Defendant [39]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 22, 1927. Edmund L. Smith,  
Clerk. [40]

[Title of District Court and Cause]

MOTION FOR A NEW TRIAL, MOTION TO  
AMEND FINDINGS OF FACT AND CONCLU-  
SIONS OF LAW AND DIRECT THE ENTRY  
OF A NEW JUDGMENT

Come now the plaintiffs, by their attorney George Penney, and file this their written motions as follows, to wit:

Their Motion for New Trial in the Above Entitled Matter:

Said motion is based upon the following grounds, and each of them:

1. That errors of law appear upon the face of the record.

2. That it appears from the pleadings and the evidence in this case that an erroneous judgment has been rendered.

3. That it is manifest from the pleadings and evidence in this case that justice has not been attained by the judgment rendered therein.

4. That the findings of fact are not supported by the evidence. [41]

5. That the judgment is not supported by the evidence.

6. That the findings of fact are insufficient to support the conclusions of law.

7. That the findings of fact and conclusions of law are insufficient to support the judgment rendered therein.

8. That the conclusions of law are insufficient to support the judgment rendered therein.

Their Motion to Amend Findings of Fact and Conclusions of Law and Direct the Entry of a New Judgment in the Above Entitled Matter:

Said motion is based upon the following grounds, and each of them:

1. That it appears from the pleadings and the evidence in this case that the court should have found that the plaintiffs were entitled to judgment against the defendant.

2. That it appears from the pleadings and evidence in this case that the plaintiffs were without fault and that the defendant is estopped from denying liability under the terms and conditions of the insurance policy issued by it to the plaintiffs.

3. That the judgment in the above-entitled matter should have been in favor of the plaintiffs and against the defendant.

Said motions and each and all of them will be based upon the files, records, documents, evidence, including reporter's transcript and exhibits received in evidence, and memoranda of counsel heretofore filed in the above-entitled action.

Dated, this 25th day of August 1947.

GEORGE PENNEY

Attorney for Plaintiffs [42]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 25, 1947. Edmund L. Smith, Clerk. [43]

[Minutes: Friday, August 29, 1947]

[Being the same as in Case No. 11775, which will be found at page 32 of Transcript of Record.]

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[Title of District Court and Cause]

### NOTICE OF APPEAL

To the Defendant Above Named, and to Its Attorney  
Angus C. McBain:

Notice Is Hereby Given That Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, plaintiffs in the above-entitled action, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the within action on the 19th day of August 1947, and from the order of the court in said action denying plaintiffs' motion for new trial, motion to amend the findings of fact and conclusions of law and direct entry of a new judgment, and motion to correct findings.

Dated: October 7, 1947.

GEORGE PENNEY and  
ROBERT M. NEWELL

By George Penney  
Attorneys for Plaintiffs

[Endorsed]: Filed & mld. copy to Angus C. McBain, atty. for deft., Oct 7, 1947. Edmund L. Smith, Clerk. [45]



4879700

In the District Court of the United States for the  
Southern District of California  
Central Division

No. 5869-Y Civil

LAURA GAWECKI and COLLETTE MITRE, doing  
business under the fictitious name of SKYLARK  
CAFE & RESTAURANT,

Plaintiffs

vs.

DUBUQUE FIRE & MARINE INSURANCE COM-  
PANY OF DUBUQUE, IOWA, a corporation,  
Defendant.

### STIPULATION FOR COSTS

Know All Men By These Presents, That we, Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe.& Restaurant, as Principals, and the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland and authorized to act as surety under the Act of Congress approved August 13, 1894, whose principal office is located in Baltimore, Maryland, as Surety, are held and firmly bound unto the Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, a corporation, in the full and just sum of Two Hundred Fifty and No/100 Dollars (\$250.00), lawful money of the United States, to be paid to the said Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, a corporation, for which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

The Condition of This Obligation Is Such, that

Whereas, the above named Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, Plaintiffs herein, have appealed, or are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment made and entered in favor of the Defendant in [46] the above entitled Court and in the above entitled action on or about the 19th day of August, 1947.

Now, Therefore, in consideration of the premises and of such appeal, if the said Plaintiffs, Laura Gawecki and Collette Mitre, doing business under the fictitious name of Skylark Cafe & Restaurant, shall prosecute their appeal to effect, and pay all costs that may be adjudged against them or either of them if the appeal is dismissed or the judgment is modified, then the above obligation to be void; otherwise to remain in full force and virtue, and in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten (10) days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 15th day of September, 1947.

SKYLARK CAFE & RESTAURANT

By Laura Gawecki

FIDELITY AND DEPOSIT COMPANY  
OF MARYLAND

By Robert Hecht—Attorney in Fact

Attest S. M. Smith—Agent

State of California,  
County of Los Angeles—ss:

On this 15th day of September, 1947, before me, Theresa Fitzgibbons, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Robert Hecht, known to me to be the Attorney-in-Fact, and S. M. Smith, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

(Seal)

THERESA FITZGIBBONS

Notary Public in and for the County of Los Angeles,  
State of California.

My Comission Expires May 3, 1950.

Examined and recommended for approval as provided in Rule 8. Angus C. McBain, Attorney; George Penney.

Approved this 7 day of Oct., 1947. Edmund L. Smith, Clerk U. S. District Court, Southern District of California; by Edw. F. Drew, Deputy.

The premium charged for this bond is \$10.00 per annum.

[Endorsed]: Filed Oct. 7, 1947. Edmund L. Smith, Clerk. [47]

[Title of District Court and Cause]

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY IN THE APPEAL IN THIS CASE

I.

That the findings of fact do not support the conclusions of law or judgment in said case in that:

- A. The plaintiffs sustained an actual loss which was intended to be covered under the insurance policy issued by the defendant.

II.

That the judgment is contrary to law in that:

- A. The defendant by its actions has waived the terms and conditions of said insurance policy which provide that the interest of the insured be sole and unconditional; [48]
- B. The defendant by its actions has waived the provision requiring a chattel mortgage endorsement on said policy while the property is encumbered by a chattel mortgage;
- C. The defendant is estopped from setting up as a defense that the interest of the insured was other than sole and unconditional ownership;
- D. The defendant is estopped from setting up as a defense that the insurance policy did not have an endorsement clause while said property was encumbered by a chattel mortgage;
- E. Said judgment is contrary to the applicable laws of the State of California and of the United States of America.

III.

That the evidence is insufficient to sustain the findings of fact of the trial court.

IV.

That the trial court erred in denying plaintiffs' motion for a new trial.

V.

That the court erred in denying plaintiffs' motion to amend findings of fact and conclusions of law and direct the entry of a new judgment.

VI.

That the court erred in denying plaintiffs' motion to correct the findings.

Dated: October 7, 1947.

GEORGE PENNEY &  
ROBERT M. NEWELL

By George Penney

Attorneys for Plaintiffs [49]

Received copy of the within Statement of Points this 7 day of October, 1947. Angus C. McBain, Attorney for Dubuque Fire & Marine.

[Endorsed]: Filed Oct. 7, 1947. Edmund L. Smith. Clerk. [50]

[Title of District Court and Cause]

### STIPULATION

It Is Hereby Stipulated by and between plaintiffs and defendant, through their respective attorneys George Penney and Robert M. Newell and Angus McBain, that the original exhibits in the above-entitled action may be sent to the Clerk of the Circuit Court of Appeals and that the court may enter an order directing the Clerk of the United States District Court to forward the original exhibits to the Clerk of the Circuit Court of Appeals.

Dated: October 21, 1947.

GEORGE PENNEY &  
ROBERT M. NEWELL

By George Penney

Attorneys for Plaintiffs

ANGUS C. McBAIN

Attorney for Deft. [54]

### ORDER

In accordance with the foregoing stipulation, the Clerk is hereby ordered and directed to forward the original exhibits in the above-entitled action to the Clerk of the Circuit Court of Appeals in connection with the appeal in this action.

Oct. 22, '47.

PAUL J. McCORMICK

Judge

[Endorsed]: Filed Oct. 22, 1947. Edmund L. Smith,  
Clerk. [55]

[Title of District Court and Cause]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 55, inclusive, contain full, true and correct copies of Complaint for Damages Under Fire Insurance Contract; Answer; Letter from Angus C. McBain to Hon. Leon R. Yankwich dated August 4, 1947; Memorandum Decision; Objections to Proposed Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment; Notice of Entry of Judgment; Motion for a New Trial, Motion to Amend Findings of Fact and Conclusions of Law and Direct the Entry of a New Judgment; Minute Order Entered August 29, 1947; Notice of Appeal; Stipulation for Costs; Statement of Points Upon Which Appellants Intend to Rely; Designation of Record on Appeal and Stipulation and Order re Original Exhibits which, together with copy of Reporter's Transcript of Proceedings on June 17, 1947 and Original Plaintiffs' Exhibits 1 to 11, inclusive and original Defendant's Exhibits A and B, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$13.85 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court  
this 31 day of October; A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

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## REPORTER'S TRANSCRIPT OF PROCEEDINGS

[Being the same as in Case No. 11775, which will be  
found at pages 41 to 70 of Transcript of Record.]

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[Endorsed]: No. 11776. United States Circuit Court  
of Appeals for the Ninth Circuit. Laura Gaweckie and  
Collette Mitre, doing business under the fictitious name of  
Skylark Cafe & Restaurant, Appellants, vs. Dubuque Fire  
& Marine Insurance Company of Dubuque, Iowa, a cor-  
poration, Appellee. Transcript of Record. Upon Appeal  
From the District Court of the United States for the  
Southern District of California, Central Division.

Filed November 3, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for  
the Ninth Circuit.



In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11775

LAURA GAWECKI and COLLETTE MITRE, dba  
SKYLARK CAFE & RESTAURANT,  
Appellants,

vs.

GENERAL INSURANCE COMPANY OF  
AMERICA,

Appellee.

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No. 11776

LAURA GAWECKI and COLLETTE MITRE, dba  
SKYLARK CAFE & RESTAURANT,  
Appellants,

vs.

DUBUQUE FIRE & MARINE INSURANCE COM-  
PANY OF DUBUQUE, IOWA,  
Appellee.

Upon Appeals From the District Court of the United  
States, for the Southern District of California,  
Central Division

APPLICATION FOR ORIGINAL EXHIBITS TO  
BE CONSIDERED IN ORIGINAL FORM  
WITHOUT PRINTING

Come now the appellants by their attorneys George  
Penney and Robert M. Newell and make formal applica-  
tion that the original exhibits in the above-entitled causes  
may be considered in their original form without printing.

Respectfully submitted,

GEORGE PENNEY and  
ROBERT M. NEWELL

By George Penney

Attorneys for Appellants

So Ordered:

FRANCIS A. GARRECHT

Senior United States Circuit Judge

[Endorsed]: Filed Nov. 13, 1947. Paul P. O'Brien,  
Clerk.

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[Title of Circuit Court of Appeals and Causes]

No. 11775 No. 11776

### STATEMENT OF POINTS ON APPEAL

Come now the appellants, by their attorneys, and in lieu of filing a statement of points upon which they intend to appeal, adopt the statement of points filed with the Clerk of the trial court in the District Court of the United States, Southern District of California, Central Division.

Dated: October 27, 1947.

GEORGE PENNEY and  
ROBERT M. NEWELL

By George Penney

Attorneys for Appellants

Received copy of the within Statement of Points on Appeal October ....., 1947. Hindman & Davis, by E. Eugene Davis, Attorneys for Appellee General Insurance Co.; Angus C. McBain, Attorney for Appellee Dubuque Fire & Marine Ins. Co.

[Endorsed]: Filed Nov. 13, 1947. Paul P. O'Brien,  
Clerk.